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No. 183.

In the

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

AMERICAN ALOE CORPORATION,

Petitioner,

vs.

ALOE CREME LABORATORIES, INC.,

Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The cross-petitioner American Aloe Corporation* respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 9, 1970.

OPINION BELOW

The opinion of the District Court for the Northern District of Illinois, Eastern Division, is reported in 291

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* Cross-petitioner, American Aloe Corporation, will be referred to as plaintiff, and cross-respondent, Aloe Creme Laboratories, Inc., will be referred to as defendant.

F.Supp. 645. The opinion of the Court of Appeals on petitions for rehearing, 420 F.2d 1248, 1970 CCH Trade Cases, Para. 73,027, appears in the appendix hereto and is cited as "Op. ....." Transcript references are cited as "T. ....."

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit upon petitions for rehearing was entered on January 9, 1970. Leave to file petitions for a second rehearing was granted on January 26, 1970. The petitions were denied on February 25, 1970 and this cross-petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May an attempt to exclude competition by means of widely publicized, bad faith claims to trademark ownership of the generic name of an agricultural commodity contravene Section 2 of the Sherman Act?

2. Does the defendant violate Section 2(c) of the Robinson-Patman Act by making a practice of granting a personal incentive bonus to a retail store manager (whether or not the manager is also the store owner), the amount of which bonus is tied to increases in the store's purchases of defendant's entire line of products?

3. Given the following steps taken by defendant during the mid-1960's and established by the record in this case, namely, that:

(a) Defendant maintained 21 ten-year contracts with independent aloe growers which gave defendant an exclusive option on the entire aloe output of these 21 growers (approximately four times the amount of aloe that defendant normally needs) and which are renewable, at defendant's option only, for another ten years;

(b) Defendant, which enjoyed a monopoly in aloe products for over ten years, represented to the public that defendant's contracts gave it 80% to 85% control over the aloe supply;

(c) Defendant executed and maintained 750 to 1,000 "Exclusive Drug Store Franchise Agreements" which provided for full line forcing and a personal bonus to the drugstore manager (whether or not the manager is the store owner), which bonus increases with the store's increasing purchases of defendant's products;

(d) Defendant summarily cut off the aloe supply to a competitor (who was then put out of business) for refusing to obey defendant's cease and desist letter against using the word "aloe";

(e) Defendant threatened infringement suits against all of its new aloe competitors (plaintiff admittedly being the prime target) and hundreds of retail stores handling aloe products based upon defendant's claims to exclusive rights in the common generic word "aloe" and to a nonexistent "registered" ALO- and design trademark;

(f) Defendant falsely accused all of its new aloe competitors (plaintiff admittedly being the prime target) in its letters to hundreds of retail stores, of "capitalizing on defendant's research" and falsely implied that none of its competitors could make a competent product unless they had misappropriated defendant's trade secrets;

is plaintiff, on remand, entitled to a judicial redetermination of its monopolization charge in which the above acts are not considered separately, but together as steps in the unlawful maintenance of a monopoly over the production and sale of aloe products?

STATUTORY PROVISIONS INVOLVED

Sherman Act, Section 2 (15 U.S.C. § 2):

> Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof shall be punished by fine not exceeding five hundred thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

Robinson-Patman Act, Section 2(c) (15 U.S.C. § 13(c):

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

STATEMENT OF THE CASE

Aloe is the generic name of a large genus of succulent plants and of products prepared from the aloe vera variety of that plant. It has, since biblical times, been noted for its healing and soothing qualities.* This plant is cul-

---

* "As the valleys are they spread forth, as gardens by the river's side, as the trees of lign aloes which the Lord had planted, and as cedar trees beside the waters." Numbers 24:6. "All thy garments smell of myrrh, and aloes, and cassia, out of the ivory palaces, whereby they have made thee glad." Psalms 45:8. "And there came also Nicodemus, which at the first came to Jesus by night, and brought a mixture of myrrh and aloes, about a hundred weight." John 19:39.

tivated as a row crop in southern Florida and southern Texas and requires approximately three and one-half years to mature into commercial usefulness. Normally, it is in adequate supply, but after a frost or freeze in the Florida or Texas growing area, the aloe supply becomes very limited.

Defendant, Aloe Creme Laboratories, Inc., is in the business of selling cosmetics and other products which contain as their principal substance the gel of the aloe. Defendant was virtually the sole processor of aloe products and maintained its monopoly over a relatively long period of time, from 1953 to mid-1960's. (Op.6). During the mid-1960's other distributors attempted to enter the market for aloe products. Besides the plaintiff, which operated as "House of Aloe", there were Patricia Carroll Cosmetics Co., Inc. (Aloe Glo); T. D. Hazelwood (Aloe-V Acne Creme); Betty Willis, Inc. (Aloe Gel); Milsan, Inc. (Aloe Magic, Aloe Vita and Oil of Aloe); Aloe 99, Inc. (Aloe 99); Pet Beauty Products, Inc. ("Pet Beauty" aloe products for dogs); and Regenertrol (Regenertrol, an Aloe product).

Defendant greeted the entry of these competitors as follows:

(1) By categorically denouncing all of its new competitors as trademark infringers; by accusing its competitors of "capitalizing on its research"; and by threatening retailers with infringement litigation for carrying products which contained the word "Aloe" on their labels or which were advertised as Aloe products or otherwise emphasized their aloe content.

(2) By utilizing "against competition" defendant's contractual control over 80% to 85% of the supply of aloe, particularly against (1) plaintiff, which had to pay exor-

bitantly to obtain a satisfactory aloe supply, and (2) Patricia Carroll Cosmetics, which had its supply of aloe cut off for refusing to acquiesce in defendant's trademark claims.

(3) By executing Exclusive Drug Store Franchise Agreements with 750 to 1,000 prestige drugstores, which agreements provide for "full line forcing" together with an increasing personal bonus to the store manager (whether or not he is the store owner) in return for increasing annual purchases by the retailer of defendant's products.

Illustrative of this type of predatory activity during the mid-1960's is the defendant's attack upon "Regenertrol". Jackson/Byron's department store in Miami posted a sign advertising Regenertrol as an "Aloe Product", which, of course, it was. The defendant immediately threatened the retailer with trademark infringement. To this threat, the retailer replied:

> We have received your letter dated May 11, 1964 in regard to the Jackson's/Byrons advertising of Regenertrol as an "Aloe Product."
>
> As you know, Regenertrol is a product of the Aloe-Vera Plant. However, if confusion has resulted because of this terminology, we at Jackson's will discontinue any further advertising of Regenertrol as an "Aloe Product."

The defendant's president then reported to his Board of Directors:

> This is to advise you that we originally gave to Jackson-Byrons Department Store a Cease and Desist under Infringement Notice as of May 11*th*; as they advertised another product under the name of ALO-Products. Jackson-Byron has promptly replied and advised that they would not again advertise this product as an ALO- product. This product was Regenertrol.

> We want to call your attention that any time you see a product cosmetic advertised as an "ALO- product", would you please advise us promptly and send us the advertisement in order that we might give such person a Cease and Desist and a strong Infringement Notice. [PX 12-14; T 101-105, 1112-1119]

Pursuant to the above policy, the defendant, from early 1964 to late 1966, sent about 50 threats of infringement to ten different competitors and transmitted blanket threats of infringement to 1,200 different retailers.

Plaintiff, American Aloe Corporation, began selling aloe products in late 1964. Shortly thereafter, defendant sent a cease and desist letter to plaintiff, threatening to bring a trademark infringement suit for plaintiff's use of the term Aloe Essence on its products. Defendant did not, however, file suit against plaintiff. Instead, in April, 1965, it sent a letter to 400-500 midwestern retailers, claiming:

> Aloe Creme Laboratories, Inc., is the owner of "ALO- and design", . . . and other ALO-combination designs.
>
> Recently, we have been informed that newly promoted competitors have unfairly copied some of our famous trademarks. Naturally, we will take whatever steps necessary to protect our TRADEMARKS against infringers and to insure the purchasing public against confusion and mistake. [PX-9; T 82-93]

Following this letter, plaintiff's sales dropped from $11,830 in March, 1965 to $1,132 in August, 1965. A second letter was sent by defendant in February, 1966 to 800-900 south and southeastern (principally Florida) retailers. In this letter defendant again stated:

> Aloe Creme Laboratories, Inc., is the owner of "ALO- and design", . . . and other ALO-combination designs. These trademarks are registered in the United States Patent Office.

> Recently, we have been informed that newly promoted competitors have unfairly copied some of our famous trademarks. Naturally, we will take whatever steps necessary to protect our TRADEMARKS against infringers and to insure the purchasing public against confusion and mistake. [PX-11, T 93-97]

Following this letter, plaintiff's sales in Florida dropped from $15,970 in February, 1966 to a negative $7,052 in June, 1966. [PX 226; T 1469, 1489]

Defendant has never owned an "Alo- and design" trademark nor a federal registration for "Alo- and design". In 1963, an application for "Alo- and design" was rejected by the Patent Office and abandoned by defendant. On February 3, 1965, just prior to the dissemination of its letter quoted above, another application by defendant for "Alo and design" was rejected by the Patent Office, principally for the reason that the mark was "merely descriptive of the goods within the meaning of Section 2(e) of the Act . . . in that it sets forth the substance from which the preparations are made. . . ." [PX-10; T 89-91]

Defendant acquiesced in this determination, amended its application to include the picture and name of Queen Nefertiti, and disclaimed "alo" and the design except in combination with Queen Nefertiti.

After the destruction of plaintiff's sales in the midwest, plaintiff brought this action against defendant on June 1, 1965 in the District Court for the Northern District of Illinois for a declaratory judgment that the word "aloe" is generic, for unfair competition and for restraint of trade and monopolization in violation of Sections 1 and 2 of the Sherman Act. Defendant counterclaimed for trademark infringement and demanded treble damages. After a trial on the merits, the District Court dismissed plain-

tiff's complaint, sustained the counterclaim, and adopted defendant's proposed findings and conclusions verbatim, awarding treble damages to defendant for plaintiff's use of the word "aloe", and permanently enjoining plaintiff from using "aloe" in its tradenames or trademarks.

The Court of Appeals for the Seventh Circuit reversed the District Court, finding that defendant had no trademark right to the generic work "aloe" or "alo". The Court of Appeals found that defendant having "maintained a natural and legal monopoly in the product over a relatively long period of time, . . . seeks to prevent others from successfully competing in the aloe cosmetic market by foreclosing their effective promotion of aloe products." (Op. 6). The Court of Appeals reversed the District Court with respect to the long term aloe supply contracts, and remanded this issue for a determination as to whether these contracts were used in restraint of trade and whether aloe vera leaves constitute a relevant market (Op. 12-14).

The Court of Appeals also determined that there was "a serious question as to defendant's good faith" in claiming "ALO- and design" as a federally registered trademark. Yet the Court of Appeals limited its remand on the issue of defendant's appropriation of the word "Aloe" to the question of *unfair competition*, and denied plaintiff's request for a remand on the *antitrust question* whether defendant's activities in attempting to suppress the competitive use of the word "aloe" had violated Section 2 of the Sherman Act. (Op. 11).

REASONS FOR GRANTING THE WRIT

1. The first issue which merits this Court's attention is whether the bad faith threats of trademark in-

fringement suits to keep retailers and competitors from advertising aloe as the principal ingredient in their products *could under any circumstances* violate the antitrust laws.

The defendant in this case threatened to bring lawsuits against over 1200 retail stores if they handled competing aloe products in which the aloe content was emphasized. Addressing itself to retailers located throughout Florida, the Southeast and the Southwest, the defendant stated:

> Aloe Creme Laboratories, Inc., is the owner of "ALO- and design", "ALO-FACE", "ALO-MOISTURE PLUS", "QUEEN NEFERTITI", design of "PLANT" and other ALO-combination designs. *These TRADEMARKS are registered in the United States Patent Office.*
>
> Recently, we have been informed that newly promoted competitors have unfairly copied some of our famous trademarks. Naturally, we will take whatever steps necessary to protect our TRADEMARKS against infringers and to insure the purchasing public against confusion and mistake. [emphasis added] [PX-11]

In fact, the United States Patent Office had not registered the trademark "Alo- and design". In fact, the Patent Office *denied* defendant registration of "Alo- and design" in 1964 and "Alo and design" in 1965. Following this, defendant *disclaimed* the word "Alo" in order to obtain registration of another trademark. (Op. 9-11)

The Court of Appeals below ruled that, while this conduct could well constitute a cause of action for unfair competition, such threats could not give rise to a violation of Section 2 of the Sherman Act. In so ruling, the Court of Appeals for the Seventh Circuit is in direct conflict (1) with the logical implications of this Court's holding in *Walker Process Equipment v. Food Machinery &*

Chemical Corporation, 382 U.S. 172 (1965), and (2) with the holding of the Second Circuit in *Kellogg Company* v. *National Biscuit Company*, 71 F.2d 662 (2nd Cir., 1934). Whether the principles of *Walker Process* are to be limited to the patent area, or whether those principles are also applicable to trademarks and other kinds of industrial property is an important question which this Court should resolve.

In *Walker Process* this Court had before it a manufacturer who allegedly sought to restrain his competitors by asserting rights in a patent that had been fraudulently procured from the Patent Office. This Court concluded that such a course of action could violate Section 2 of the Sherman Act and remanded the case for a determination as to whether a relevant market was encompassed by the scope of the patent claims. Here, the defendant short-circuited the route followed in *Walker Process*. Having failed twice to obtain from the Patent Office a registered trademark for "Alo- and design", the defendant bypassed the Patent Office and merely represented to the retail trade that it had registered such a trademark. Unless a distinction is to be drawn between patents and trademarks in the area of fraudulent procurement and enforcement of industrial property rights, *Walker Process* should surely control here.

Admittedly, a trademark is not identical to a patent. While a patent is a limited exception to the antitrust laws sanctioned by the Patent Code, a trademark should serve to promote competition by enabling the merchant to identify himself as the source of his goods and appropriate to himself whatever good will has been created by the price, quality or other attributes of his goods. When a competitor abandons this salutary purpose, how-

ever, and seeks to appropriate to himself the common and only name of an agricultural commodity (and therefore all of the goodwill inhering in the commodity itself) by fraudulently claiming the government-sanctioned right to prevent others from using that name to describe their products, he transcends the protection accorded to trademarks and embarks upon an exclusionary course which can only be analogous to the exclusionary course found in *Walker Process*.

This Court has already firmly established that a trademark can be used unlawfully as an instrument of exclusion. *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593 (1951) held that trademarks cannot, any more than patents, be used in license agreements to restrain the trade encompassing an entire market. This Court has also firmly established that the fraudulent procurement or enforcement of patent claims may violate the antitrust laws, and the federal courts of appeal have, following *Walker Process*, permitted full reconsideration of Section 2 claims upon reversal of a district court's determination of patent validity. *Beckman Instruments, Inc.* v. *Chemtronics, Inc.*, 1970 Trade Cases, Para. 73,138 (5th Cir., 1970). The circuit courts are now divided, however, on the applicability of Section 2 to bad faith enforcement of trademarks. The Seventh Circuit's decision below cannot be reconciled with the Second Circuit's decision in *Kellogg Company* v. *National Biscuit Company* 71 F.2d 662 (2nd Cir., 1934):

> If a person having no substantial claim to a trademark in the words "shredded wheat" uses the claim in bad faith to threaten a competitor and his customers with lawsuits in order to prevent dealings

> by the latter in that commodity, they would seem to be steps in an attempt to obtain a monopoly.
>
> * * *
>
> While it doubtless would not be within the antitrust acts to bring a suit to assert a patent or trademark right whatever the motive, if the claim was valid, an attempt to assert a known invalid claim would be a different matter (71 F.2d at 665, 666).

This Court has long noted the public interest involved in keeping enforcement of trademark claims within reasonable bounds. In *Kellogg* v. *National Biscuit Co.*, 305 U.S. 111, 122 (1938) this Court stated:

> Sharing in the goodwill of an article unprotected by *patent or trademark* is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested. (emphasis added)

Long before the passage of the Sherman Act, this Court pointed out:

> No one can claim protection for the exclusive use of a trademark or tradename which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. *Delaware & H. Canal Co.* v. *Clark*, 13 Wall 311, 323 (1872).

Congress has also expressed its concern in the Lanham Act over the possible antitrust use of trademarks by denying incontestability to a trademark which "has been or is being used to violate the anti-trust laws of the United States." § 33(b)(7) of The Lanham Act (15 U.S.C. § 1115(b)(7)).

Just as competition was threatened in *Walker Process* by enforcement of a known invalid patent, so here a monopoly may result from the purported appropriation of the generic name of an agricultural product. We do

not believe that this Court intended to limit *Walker Process* to the patent area and thus sanction a competitor's attempt to exclude its competition from that which properly belongs in the public domain.

2. Commencing in January, 1965 and continuing to the time of trial, defendant had executed its Exclusive Drug Store Franchise Agreement with 750 to 1,000 prestige drug stores. These agreements are signed by the drugstore manager (whether or not he is the owner) and specifically provide for an annual bonus to the manager that increases as the store's purchases of defendant's entire aloe cosmetic line increases. [PX-18; T 119-127].

These bonus arrangements with the store manager are given in addition to, and must be distinguished from, so-called "push money" given to sales girls who do not control the stores purchases, but rather perform resale services for the supplier.

The District Court concluded that these franchise agreements did not violate the commercial bribery provision of the Robinson-Patman Act, 15 U.S.C. §13(c). [Conclusion 17]. The Court of Appeals affirmed without comment. [Op. 12].

Bonuses of this type should be specifically and absolutely banned within the language of Section 2(c) of the Robinson-Patman Act, under which it is unlawful

> to pay or grant . . . anything of value as a commission, brokerage, or other compensation, . . . except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, . . . to an agent, representative, or other intermediary therein where such intermediary is . . . subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

In addition, defendant took no steps to obtain the store owner's signature to the agreement and confessed ignorance as to whether the store owner was aware of the bonus arrangement with the manager. This conduct has been held to constitute traditional commercial bribery to which Section 2(c) has been held applicable. *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.*, 235 F.Supp. 393 (D. Idaho, 1964), aff'd 351 F.2d 851 (9th Cir. 1965).

The granting of a personal bonus based on quantity purchases to the individual responsible for the customer's purchases is a pernicious practice. Like tying and reciprocity, it injects an alien factor into the struggle for that customer's business and works inevitably toward exclusive dealing between the grantor and the recipient of the bribe. Given the scale upon which defendant engages in this practice, these volume bonuses should be held to violate Section 3 of the Clayton Act as well. Cf. Rowe, *Price Discrimination under the Robinson-Patman Act*, page 151, footnote 47 (1962).

This Court's observations upon the legality of such bonuses within the context of Section 2(c) of the Robinson-Patman Act and Section 3 of the Clayton Act would be welcome to any new competitor who faces this increasingly prevalent practice.

3. The Court of Appeals remanded the antitrust issue of defendant's exclusive aloe supply contracts (Op. 12), but failed to allow the district court to consider the remaining activities of the defendant as component parts of one monopolization plan. In so limiting the District Court, the Court of Appeals misapplied the rule of *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690, 699 (1962), that the trier of fact "must look at the whole picture and not merely at the individual figures in it."

In this case, the "whole picture" is sordid indeed. Besides its campaign to exclude others from using the word "aloe", the defendant's exclusionary efforts extended to every facet of the aloe industry.

Exclusion of others from aloe supply: Because aloe takes so long to mature, and can be so easily damaged by frost or freeze, defendant realized that by cornering the aloe supply, it could effectively prevent anyone from competing with it. To accomplish this, defendant entered into ten year contracts with 21 aloe suppliers. Under these contracts the defendant has the right (but not the obligation) to take the aloe grower's entire output, and defendant (but not the grower) has the right to renew this privilege for another ten years. [PX-5; T 62-69]

Defendant's purpose in entering into these contracts and the extent of control gained by defendant's contracts is best stated in a News Release which defendant itself distributed in 1965. Quoting an investment analyst, Lin Tso, the defendant stated:

> Perhaps of greatest importance, . . . is his statement, "*it is the access to the raw material that counts*". Investment analyst and author, Lin Tso, explains that *Aloe Creme has 85% of the production of the Aloe Vera plant under contract* and that the company enjoys a large raw material position, *not only against competition*, but also against possible damage by the elements to the Aloe Vera plants". (emphasis added) [PX-6; T 69-76]

Subsequently, defendant prepared and circulated 10,000 reprints of a magazine article (PX-7) which stated:

> Rodney Stockton knew that his company was making progress when major cosmetic houses offered to buy him out; one company futilely tried to acquire the

> majority of his stock. An effort to restrict him by cornering the market on his plants also failed when it was discovered that *Stockton already controlled 80 percent of the rare aloe vera growing in the country.*
>
> "*Keeping women beautiful is a cut-throat business,*" he admits. (emphasis added) [PX-7; T 77-79, 443-444, 1493, 1494]

The use of these supply contracts as an offensive competitive weapon cannot be fully appreciated until it is realized that defendant normally purchases only 25% of the aloe supply that it has under contract [Stockton, T 1349].

Nor has defendant hesitated to use its monopoly power to close off the aloe supply. In September, 1964, the defendant learned that its aloe purchasing agent in Texas was also supplying a small competitor, Patricia Carroll Cosmetics, which sold "Aloe Glo". Defendant threatened Patricia Carroll with trademark infringement because of the "aloe" in Aloe Glo. After Patricia Carroll refused to change the name, defendant did not attempt to enforce its claims in a court of law. Much easier it was for defendant to cause its Texas agent merely to cancel Patricia Carroll's aloe supply. As defendant's Vice President in charge of supply put it:

> Q: Now, why is Patricia Carroll Cosmetics no longer on the market?
>
> A: Well, because they had what I felt was a trademark that was in conflict with ours and they had made some remarks around Texas, derogatory to us.
>
> Q: And so what happened?
>
> A: Well, Mrs. Ewald [the Texas agent of defendant] didn't produce it for them any more. [Holland, T 552]

One small group of aloe growers in Brownsville, under the leadership of T. D. Hazelwood, refused to sign defendant's ten year contract. Defendant then complained to the Texas Department of Agriculture (and others) that Hazelwood's plants were diseased, and accused Hazelwood of violating defendant's right to "aloe" (Hazelwood marketed aloe d/b/a "Aloe-V Distributors"). Defendant then instructed the same Texas agent in September of 1964:

> As you and I know, people are funny and there are always those who try to ride the coattails of successful operations. I am sure with some of your connections *you can spike their sales* and we also will take any action we can to clean up this unethical competition. (emphasis added) [PX-124; Holland, T 537-538]

Exclusion of competition from prestige drugstores: Defendant's 750-1,000 "Exclusive Drug Store Franchise Agreements" contain "full line forcing" clauses, *i.e.*, requirements that the drugstore stock and sell defendant's full line of aloe cosmetics. More important, the agreements have a most unusual clause granting the drugstore manager (whether or not he is the store owner) a personal bonus which increases as the store's purchases of defendant's products increase. The inevitable effect of these contracts, which defendant began to use in January of 1965, is to induce the store manager not to purchase competitive aloe products. These commissions, as previously noted, violate Section 2(c) of the Robinson-Patman Act, Section 3 of the Clayton Act, and the laws against commercial bribery. For the purposes of this issue, however, these "private concessions" constitute steps in the unlawful maintenance of monopoly power which have been

characterized as "an unfair practice evincing an exclusionary intent" under Section 2. *Union Leader Corp.* v. *Newspapers of New England, Inc.*, 284 F.2d 582 (1st Cir., 1960), cert. denied 365 U.S. 833 (1961).

During the same period (1965-1966) the drugstore managers were told, under threat of infringement, not to deal with any of defendant's aloe competitors, whom defendant categorically condemned as trademark and trade secrets infringers. Threats of infringement suits such as defendant made against retailers and competitors like Patricia Carroll and plaintiff, which threats are not intended to be followed by the actual filing of a lawsuit, have been held to constitute steps in a scheme to monopolize. *United States* v. *Besser Mfg. Co.*, 96 F.Supp. 304 (E.D. Mich. 1951), affirmed on other grounds, 343 U.S. 444 (1952).

The Court of Appeals erred in "compartmentalizing" plaintiff's monopolization case and thereby overrode a fundamental Sherman Act doctrine established by this Court in *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. 690, 698-99 (1962):

> It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. ". . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States* v. *Patten*, 226 U.S. 525, 544. . . ."

In the light of the "mechanical adoption" by the trial court of defendant's proposed findings of fact and the resultant determination that plaintiff's hands were unclean, plaintiff's monopolization charge was never fully considered below. Plaintiff should be afforded an opportunity on remand to obtain a full and meaningful redetermination of plaintiff's charge under Section 2 of the Sherman Act.

CONCLUSION

For the reasons given, this Cross-Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 17250 SEPTEMBER TERM 1968 — APRIL SESSION 1969

AMERICAN ALOE CORPORATION,
Plaintiff-Appellant,
v.
ALOE CREME LABORATORIES, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

JANUARY 9, 1970

ON PETITIONS FOR REHEARING[1]

Before CASTLE, *Chief Judge*, FAIRCHILD, *Circuit Judge* and BEAMER, *District Judge*.[2]

BEAMER, *District Judge*. This is an appeal from the Northern District of Illinois involving claims of trademark infringement and invalidity, unfair competition and anti-trust violation and counterclaims based on similar charges. The central question before the Court is the validity of defendant-appellee's, "ALO-" trade names, and plaintiff-appellant's alleged infringement thereof.

[1] On consideration of the petitions for rehearing filed by each of the parties and the answer of defendant-appellee to plaintiff-appellant's petition (filed at the request of the Court) the opinion filed herein July 31, 1969, is withdrawn and this opinion is adopted as the opinion of the Court.

[2] Judge Beamer is sitting by designation from the Northern District of Indiana.

Defendant, Aloe Creme Laboratories, Inc. began the sale of an ointment in 1953, and cosmetics in 1957, both containing the gel of the sub-tropical aloe vera plant. The use of the fresh gel from the cut leaves of this plant had long been known to the natives of the region in which it is grown as a remedy for sun burn. Prior to defendant's entry into the market and its development of a process of stabilizing and preserving the gel, it had too short a shelf life to be commercially valuable. Due to defendant's efforts over the intervening years, its products, containing Aloe vera gel, became widely known and commercially successful. Beginning in 1953 and throughout this period, the defendant operated under the trade name "Aloe Creme Laboratories, Inc.". Its first product was known under the trade name ALO-CREME OINTMENT which was changed to ALO-OINTMENT in 1963. Commencing in 1957, defendant began the manufacture of various cosmetics known as ALO-CREME FACE, and ALO-CREME HANDS, and ALO-CREME BODY, which names were abbreviated to ALO-FACE, ALO-HANDS, and ALO-BODY in 1963. Since 1963, the defendant has also used the trademarks ALO-PLUS, TRAV-ALO, ALO-MOISTURE PLUS, ALO-V SKIN CLEANSER, ALO-BEAUTY MATTE, ALO-TONE, ALO-ROUGE, ALO-LIPSTICK, ALO-POUDRE, ALO-V SHAMPOO, ALO-COSMETICS, ALO-CABANA SET, ALO-LEGS, FASHION TAN and AFTER TAN, all of which were the subject of trademark registrations.

Plaintiff commenced operations on January 20, 1964, and made its first sales of products bearing trademarks on March 8, 1965. Plaintiff adopted as its trademarks, HOUSE OF ALOE, ALOE ESSENCE, DESIGN OF PLANT, JEL D'ALOE, MASQUE OF ALOE and TROPICALOE. After defendant notified plaintiff of its claim to a family of ALO trademarks which it claimed was infringed by plaintiff's use of ALOE in its trade names, plaintiff commenced this action asking a declaratory judgment finding defendant's trademarks invalid and upholding plaintiff's right to use its ALOE trademarks,

together with a claim of unfair competition and antitrust violation. Defendant counterclaimed for trademark infringement and unfair competition. The district court found for the defendant-counterclaimant on all issues, dismissed the complaint, awarded treble damages and enjoined the plaintiff from using ALOE in its trade names or trademarks.

Central to a determination of the issues in this case is whether defendant's use of the term ALO- is sufficient to preclude others from using the words Aloe or Alo. Also in question is defendant's claim to trademark registration of "ALO- and Design". We hold that defendant has no trademark rights, through use or registration, in the term "ALO-" by itself.

Aloe is the generic name of a large genus of succulent plants and of the drugs prepared from the aloe vera variety of that plant. (Webster's New International Dictionary, 2d ed. 1934.) In particular, for purposes of this case, it is the generic name for the gel of the aloe vera plant. It is undisputed that in the absence of a strong showing of secondary meaning, a generic name cannot be the basis of a trademark. *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111, 83 L.ed. 73 (1938) (shredded wheat); *Henry Heide, Inc.* v. *George Ziegler Co.*, 354 F.2d 574 (7th Cir. 1965) (ju-jubes); *Donald F. Duncan, Inc.* v. *Royal Tops Manufacturing Co.*, 343 F.2d 655 (7th Cir. 1965) (yo-yos).

Defendant concedes that this is the law, but maintains that it is not marketing "Aloe" as such, but is selling cosmetics containing Aloe, which are not encompassed within the generic or descriptive name and with respect to which the word "Aloe" is at most, suggestive. In view of the fact that Aloe is the distinguishing ingredient in defendant's products upon which its claims to special effectiveness are based, the Court must find that "Aloe" is the generic and descriptive term for that class of cosmetics containing Aloe and that any claim to a trademark in the name must be based on "secondary meaning".

The case is unlike *Coca-Cola Co.* v. *Koke Co.*, 254 U.S. 143, 65 L.Ed 189 (1920) where the term Coke or Coca was originally descriptive of the extract of Coca leaves, or cocaine contained in the plant, but which lost this generic sense when the plaintiff was compelled to remove any effective cocaine from the product, after which Coca or Coke acquired a purely secondary meaning. Neither is this case controlled by those decisions which have found that exact copies or phonetic equivalents infringe purely suggestive names which have acquired trade name significance, such as *Douglas Labs. Corp.* v. *Copper Tan, Inc.*, 210 F.2d 453 (2nd Cir. 1954) which said "copper tone" for sun tan lotion was suggestive rather than descriptive; and *Orange Crush Co.* v. *California Crushed Fruit Co.*, 297 F. 892 (D.C. Cir. 1924) which said "Crush" was not descriptive of a soft drink and was not used in its generic sense; nor is it in the same class with those which hold that terms having a general descriptive but not denominative sense acquired secondary meaning. *Keller Products, Inc.* v. *Rubber Linings Corp.*, 213 F.2d 382 (7th Cir. 1954) (*Tub Cove* v. *Tub Kove*); *Speaker* v. *Shaler Co.*, 87 F.2d 985 (7th Cir. 1937) (*Hot Patches* v. *Hot Patches*—for vulcanizing products); *Barton* v. *Rex-Oil Co., Inc.*, 29 F.2d 474 (3rd Cir. 1928) (*Dyanshine* v. *Dye & Shine*—for shoe polish). It must also be distinguished from the Supreme Court's decision in *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U.S. 315; 83 L.ed. 195 (1939) where the essentially descriptive and denominative term "nu-enamel" had acquired a secondary meaning at least partially through its widespread application to products other than enamel—such as paint brushes.

This case is properly classified with those where the term in question was the common name for the article sold and hence denominative of that article regardless of source. *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111, 83 L.ed. 73 (1938) (shredded wheat); *Henry Heide Inc.* v. *George Ziegler Co.*, 354 F.2d 574 (7th Cir. 1965) (ju-jubes); *Donald F. Duncan, Inc.* v. *Royal Tops Manu-*

facturing Co., 342 F.2d 655 (7th Cir. 1965) (yo-yos) and particularly with those cases where the term was denominative of the prime or distinguishing ingredient in the product. Compare *LeBlume Import Co.* v. *Coty*, 293 F. 344 (2nd Cir. 1923) (*Lorigan* v. *L'Origan de Coty*—for perfume); *Pinaud, Inc.* v. *Huebschman*, 27 F.2d 531 (E.D. N.Y. 1928) (*Lilas De France* v. *Lilas De France*—for perfume); *Wells & Richardson Co.* v. *Siegel, Cooper & Co.*, 106 F. 77 (N.D. Ill. 1900) (*Celery Compound* v. *Celery Compound*) with *Dixi-Cola Laboratories, Inc.* v. *Coca-Cola Co.*, 117 F.2d 352 (4th Cir. 1941) (*cola* v. *cola*—for soft drink containing extract of cola nut). It is clear from an examination of the cases that while the test may be stated in the same language in both types of cases, it is much more difficult to establish secondary meaning in a denominative term (as used herein) than in a purely descriptive one.

The criteria for determining whether a denominative term has acquired the necessary secondary meaning to be a trademark are best described in the language of the Supreme Court in *Kellogg Co.* v. *National Biscuit Co.*, 305 U.S. 111, 118, 83 L.ed. 73, 79 (1938):

> It is contended that the plaintiff has the exclusive right to the name 'Shredded Wheat,' because those words acquired the 'secondary meaning' of shredded wheat made at Niagara Falls by the plaintiff's predecessor. There is no basis here for applying the doctrine of secondary meaning. The evidence shows only that due to the long period in which the plaintiff or its predecessor was the only manufacturer of the product, many people have come to associate the product, and as a consequence the name by which the product is generally known, with the plaintiff's factory at Niagara Falls. But to establish a trade name in the term 'shredded wheat' the plaintiff must show more than a subordinate meaning which applies to it. It must show that the primary significance of the term in the minds of the consuming public is not the product but the producer.

In the recent decision of *Henry Heide, Inc.* v. *George Ziegler Co.*, 354 F.2d 574, 576 (7th Cir. 1965) dealing with the term "jujubes" for fruit flavored gum candy, this Court said: "But more importantly, a generic term in circumstances such as those before us may not be exclusively appropriated as a trademark, regardless of the length of time it may have been used by a single distributor at the consumer level and despite whatever promotional effort he may have expended to exploit it." See *Donald F. Duncan, Inc.* v. *Royal Tops Manufacturing Co.*, 432 F.2d 655 (7th Cir. 1965); *Dixi-Cola Laboratories* v. *Coca-Cola Co.*, 117 F.2d 352 (4th Cir. 1941).

The defendant-appellee, Aloe Creme Laboratories, Inc., here seeks to accomplish what the courts prohibited in the above cases. Having originated the use of a stabilized aloe gel in cosmetics and maintained a natural and legal monopoly in the product over a relatively long period of time, it seeks to prevent others from successfully competing in the Aloe cosmetic market by foreclosing their effective promotion of aloe products. Defendant cannot appropriate for its own trademark use the generic name of the distinguishing and effective ingredient in its product. Defendant has neither patent rights in the "ingredient concept" of using Aloe in cosmetics nor a legal right to maintain a monopoly in Aloe cosmetics. By using the phonetic equivalent of the generic name as the sole common and distinguishing mark of its products, defendant invited confusion. Until 1963, defendant differentiated its product by the name ALO-CREME, which would have come nearer to maintaining its trademark significance, but in the two to three years between the adoption of the singular ALO- and the filing of this suit, "Aloe" or "Alo" did not lose its generic meaning or denominative sense. Those cases relied upon by defendant to establish the secondary meaning in the name of a plant used as an ingredient are distinguishable.

In *LeBlume Import Co.* v. *Coty*, 293 F. 344 (2nd Cir. 1923) the court found that Lorigan, or L'Origan, although generic when applied to a particular genus of plant, had

come to mean the blended perfume produced by Coty, and not the fragrance of the particular plant. It laid stress on the fact that the perfume in question was a blend, unidentifiable with the genus of plants whose name it bore. In contrast, both plaintiff's and defendant's products here are promoted for their common ingredient—Aloe—with which both product lines are clearly identifiable. The defendant here cannot seek to promote its products by stressing the active ingredient which is available to all and also claim that the only proper name of that ingredient has lost its primary generic significance.

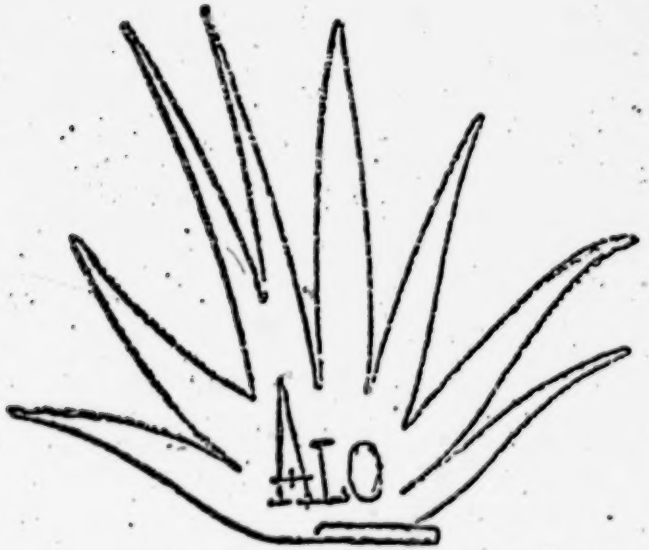
In *Pinaud, Inc.* v. *Hirschman*, 27 F.2d 531 (E.D. N.Y. 1928) the Court found that the French expression Lilas De France, when applied to a perfume long manufactured and promoted by one company, had acquired a secondary meaning, but it also indicated that the English counterpart of the same words, "French Lilac," was purely descriptive and without secondary meaning. In *Wells & Richardson Co.* v. *Siegel, Cooper & Co.*, 106 F. 77 (N.D. Ill. 1900) the Court found that the expression "Celery Compound" had acquired a secondary meaning and that others could not copy it, but it did not find that "Celery" had acquired a similar meaning. Thus a term which in itself does not have trademark significance may be combined with others in such a manner as to mean one product and one manufacturer only. While "Aloe" and "Hands" may both be generic terms—as are most words—their combination in the phrase "ALO-Hands" may constitute a valid trademark as found by the Patent Office in issuing a registration for that term. Therefore, here the Court holds that the various ALO- trademarks of defendant in themselves are valid, but cannot be considered to have established a secondary meaning in the word Aloe itself. Others may not copy the exact trademarks used by defendant, because those have come to mean defendant's products exclusively, but they may use the word "Aloe" as part of their own trademark, just as defendant has done.

Defendant contends, and the trial court found, that it has a "family of ALO- trademarks" such as to preclude others from using the term "Aloe" in their trade names. This conclusion must be reversed. It is apparent that a generic term cannot be the basis of a family of trademarks such as to preclude others from using the term unless the term has acquired a "secondary meaning". Compare *Lauritzen & Co., Inc.* v. *Borden Company*, 239 F.2d 405 (Court of Customs and Patent Appeals, 1956) with *Motorola, Inc.* v. *Griffiths Electronics, Inc.*, 317 F.2d 397 (Court of Customs and Patent Appeals, 1963). The family of trademarks doctrine is essentially similar to that of "secondary meaning". Without "secondary meaning" there is no "family of trademarks" in the sense defendant contends here. The lack of a "family of ALO- trademarks" does not, of course, invalidate each of defendant's registered trade names which share the "ALO-" term. *Each trade name in itself* may be distinctive enough to create a valid trademark even though the common term among the group has not achieved sufficient secondary meaning to preclude others from using the term.

Having determined that the generic term "ALO-" has neither achieved trademark significance, nor become the basis of a "family of trademarks", we now examine defendant's claim of trademark registration of "ALO- and Design" in Registration No. 804,536.

The trial court in its finding of fact No. 16 found: "Defendant is the owner of the following trademarks and registrations therefor issued to it by the United States Patent Office: . . . No. 804,536 for ALO- and Design. . . ." This portion of finding No. 16 is clearly erroneous. Trademark Registration No. 804,536, while owned by the defendant, is not for "ALO- and Design", but rather for "Queen Nefertiti ALO and Design". This fact is made clear by the history of defendant's application for registration and the proceedings thereafter in the Patent Office.

On July 30, 1964, defendant applied for registration of "ALO- and design of a plant". The following drawing was submitted by the defendant:



The Patent Office treated this as an application for a trademark for "ALO and Design"; the Patent Office dropped the hyphen after ALO presumably because the drawing submitted included no hyphen.

On February 3, 1965, the Patent Office sent defendant notice of its refusal to register "ALO and Design". Among other reasons for the refusal, the Trademark Examiner pointed out that the mark was "merely descriptive of the goods . . . in that it sets forth the substance from which the preparations are made together with a representation thereof, inasmuch as ALO is short for Aloe which is the genus designation for the species Aloe Vera and others."

Defendant's application for registration included a specimen of the following mark which had been used in defendant's advertising:

The Patent Office pointed out that this drawing could not be the basis of a registered mark in "ALO and Design" by itself since the word ALO and the design of the plant "is tied in with the portrait of Queen Nefertiti and *does not create a separate impression.*" (Emphasis added.) The Patent Office required the defendant to add the words "Queen Nefertiti" and her portrait to the drawing originally submitted. Defendant was further required to include a disclaimer of registration of the word "ALO" and the representation of the aloe vera plant.

Defendant amended its application to include the disclaimer of registration of ALO and representation of plant and submitted a new drawing which included the words "Queen Nefertiti" and the portrait of the Queen. The Patent Office then renamed the amended application "Queen Nefertiti ALO and Design". Defendant was sent notice that the "Queen Nefertiti ALO and Design" mark would be published on December 14, 1965. On March 1, 1966, the mark was registered and received No. 804,536.

A serious question as to defendant's good faith is raised by its claim that in No. 804,536 it owns the registration for "ALO and Design." The Patent Office specifically rejected defendant's application for registration of "ALO and Design" stating that "ALO" is a descriptive term. There can be no claim that "ALO and Design" as included in "Queen Nefertiti ALO and Design" has separate significance since the Patent Office informed defendant that the "ALO and Design" does not create a separate impression. Furthermore, in obtaining registration for "Queen Nefertiti ALO and Design" defendant *specifically disclaimed* registration rights in "ALO and the representation of the aloe plant" (as it was required to do by the Patent Office).

Defendant's questionable use of No. 804,536 began even before the mark was registered. On February 21, 1966, defendant sent letters to several hundred retailers in which it claimed to be the owner of "ALO and design," a trademark "registered in the United States Patent

Office." This letter, which threatened to "take whatever steps necessary" to stop "newly promoted competitors" from infringing on this and other trademarks, was sent nearly two weeks before the Patent Office registered the "Queen Nefertiti ALO and Design" mark.

In light of the foregoing, we remand this case for a redetermination of the question of defendant's unfair competition. We overrule the finding that defendant is the owner of a registered "ALO- and Design" trademark. We hold that defendant's use of the generic term "ALO-" has not created a secondary meaning in that word, and therefore, defendant has no exclusive trademark rights in the word "ALO-" by itself. We reverse the trial court's conclusion that defendant owns a "family of ALO- trademarks" such as to preclude others from using the word "Aloe" in their trade names.

We reverse the trial court's conclusion that plaintiff's TAN LIFE infringed defendant's FASHION TAN and AFTER TAN trademarks, because the only common word, "tan", is too descriptive to be the basis of trademark rights under the facts of this case.

On the basis of these conclusions we reverse the district court's holding that plaintiff was guilty of trademark infringement. We leave to the district court the determination of whether plaintiff was guilty of unfair competition absent of showing a trademark infringement.

Finally we come to the question of whether defendant is guilty of violating the antitrust laws by its use of its growers' supply contracts and its drugstore franchise agreements. We affirm the conclusions of the trial court that defendant's drugstore franchise agreements were not used in violation of the antitrust laws. However, we must set aside the conclusion of the trial court that defendant's growers' supply contracts were not used in violation of the antitrust laws since the district court's findings of fact are insufficient to support this conclusion.

Before there can be a conclusion as to whether there has been a substantial lessening of competition, monopolization, or a contract in restraint of trade, a determination must be made as to what are the relevant product markets within which to guage a firm's power or the effect of its activities. In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325, 8 L.ed.2d 535 (1962) the Supreme Court stated:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes.

Factors such as a product's peculiar characteristics and uses, distinct prices, and sensitivity to price changes are all indicia which may be used in determining boundaries of a submarket.

The findings of fact made by the trial court do not provide a basis for its conclusion that the cosmetics industry is the relevant market. On remand, the district court should re-examine this question weighing the factors set out in the *Brown Shoe* opinion. It will be necessary to make a determination whether there exists a separate market for aloe vera leaves. The district court will also need to inquire whether aloe vera products constitute a submarket of the cosmetic industry.

Once the district court has decided which product markets are relevant for antitrust consideration, the effect of defendant's growers' supply contracts will have to be weighed within those markets. The ease of entry into these markets and the cost of aloe vera leaves to defendant and its competitors are findings of fact which will have to be made. On the basis of these findings, the district court will be able to decide the issues raised by

plaintiff's charges of antitrust violation based on the defendant's exclusive contracts with the growers of a large percentage of aloe vera leaves produced in the United States.

Affirmed in part and reversed in part.

Remanded to the district court for further proceedings consistent with this opinion.

Appellant shall recover its costs of appeal.

SUPREME COURT, U. S.

JUN 18 1970

JOHN F. DAVIS, CLERK

No. 183 [redacted]

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

AMERICAN ALOE CORPORATION,

Petitioner,

vs.

ALOE CREME LABORATORIES, INC.,

Respondent.

BRIEF IN OPPOSITION TO CROSS PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1609

AMERICAN ALOE CORPORATION,

Petitioner,

vs.

ALOE CREME LABORATORIES, INC.,

Respondent.

BRIEF IN OPPOSITION TO CROSS PETITION FOR WRIT OF CERTIORARI

Respondent prays that the cross petition for writ of certiorari be denied.

QUESTION PRESENTED

The three questions listed by petitioner are based upon the fallacy that hypothetical matters which might be raised (but which have been categorically disproven in the record and held to be so by the trial and reviewing courts) can

serve as issues to be reviewed by this Court. There is in fact only one question presented by the record in this case:

Whether both courts below were correct in finding no support for petitioner's claims for antitrust relief arising from disconnected and unproven charges of unfair competition.

STATEMENT OF THE CASE

Petitioner's statement should be supplemented by the following statement of facts regarding petitioner's claims of unfair competition.

Both courts below found that respondent, Aloe Creme Laboratories, Inc., developed a process for stabilizing and preserving the gel of the aloe vera plant, and thereby pioneered cosmetic uses for the gel. Both courts found that respondent registered and used a series of trademarks, all of which contained the word ALO-.

The district court found that respondent had established secondary meaning for ALO- as applied to its cosmetic line. The Court of Appeals for the Seventh Circuit disagreed, holding the single ALO- trademark to be "denominative" and without trademark protection. The district court found that respondent had not made improper claims to trademark protection for ALO-. The Court of Appeals disagreed and remanded the case for a "redetermination" of the question of whether respondent's claim to a trademark in ALO- constitutes unfair competition.

The Court of Appeals also reversed the district court's finding that respondent did not utilize contracts with its aloe growers in restraint of trade. The Court of Appeals directed the district court to consider whether the "cos-

metic industry'' or the ''market for aloe vera leaves'' constitute the relevant market for further antitrust considerations.

Both courts agreed that respondent did not utilize its contracts with drugstore managers to violate the antitrust laws or the Robinson-Patman Act. The drugstore franchise agreements executed by respondent require the stores to have at least three other cosmetic franchise lines before the agreements are offered. (R. 124-25, 1466.) The agreements are cancellable by either party on 30 days notice. (R. 120.) Furthermore, approximately 60 of the drugstores signing respondent's franchise agreements also sell petitioner's products. (R. 1462, 1463, 1465, 1467.)

While witnesses testified that respondent once claimed to control 80 to 85% of the aloe supply, there was no proof that respondent controlled this percentage of the aloe market. In fact, petitioner's own officers testified that it had always had an adequate supply of aloe vera plants. (R. 1930, 1977, 2179, 2296.) At trial, on appeal, and again in its cross petition here, petitioner has complained that respondent disparaged aloe products of competitors. The record shows that the aloe market was plagued with problems of contamination, and that respondent's letters were intended to protect that market. (R. 226-27.)

REASONS FOR DENYING THE WRIT

1. The record amply supports the decision of both courts below to deny petitioner's hypothetical antitrust claims directed toward disparagement and drugstore franchise agreements.

2. There is no conflict among the circuits and no holding of the courts below at variance with any decision of this Court.

I.

THE ISSUES SUBMITTED BY PETITIONER ARE HYPOTHETICAL OR CONTRADICTED BY EVIDENCE IN THE RECORD.

The questions presented by petitioner ignore the record in this case, and instead are framed as hypothetical statements of issues which might be presented in a proper case. Even a cursory review of the record demonstrates that this is not such a case.

Petitioner's questions all relate to allegations of unfair competition which petitioner hopes to elevate to antitrust claims. While it is true that decisions indicate that antitrust claims *might* be founded on proper allegations, properly proven in a given case, there are no circumstances in this record to support the issues framed by petitioner.

The disjointed charges of anti-competitive conduct commence with the allegation that respondent used drugstore franchise agreements for full-line enforcement of its product sales. Both courts below found, and the record shows, that drugstore managers were not required to sign the agreements, the agreements expressly required the presence of three other cosmetic lines, and most drugstores carried both petitioner's and respondent's cosmetic lines.

The sole citation in support of petitioner's claim that the drugstore agreements violated the Robinson-Patman Act is *Sterling Nelson & Sons, Inc.* v. *Rangen, Inc.*, 235 F. Supp. 393 (Idaho, 1964), *aff'd*, 351 F. 2d 851 (9th Cir. 1965), where a state official was found to be guilty of taking bribes from the defendant corporation, which was in turn granted a first position in competitive bidding. The state official receiving the bribe "obstructed and impeded the testing of products of other possible suppliers, including plaintiff, and action on favorable reports on such tests." (235 F. Supp. at 295.) Such authority is hardly applicable to the drugstore contracts here.

Petitioner's claims of disparagement and inflated statements as to respondent's share of the market hardly merit attention. The record discloses that respondent's letters to officials and competitors were part of an attempt to insure that the aloe market remain free of contaminated products. Respondent's claims of contamination were in fact valid. Certain of its competitors had received customer complaints and had been returned products which were in fact contaminated. (R. 226-27.)

Representations as to market share can hardly support an antitrust claim. The issue is the extent of respondent's control of the relevant market in fact, not what persons claimed this control to be. The case has been remanded for consideration of the only relevant antitrust issue, *i.e.*, the nature of the relevant market and respondent's actual share of that market.

To the extent that respondent can be said to have misrepresented the status of its trademarks, this issue likewise has been remanded to the district court for "redetermination" in light of the Court of Appeals' opinion that petitioner was not guilty of unfair competition. Based

upon the record as it exists, and subject to review by the district court, there is no evidence for any claim of antitrust violations other than those which the district court has been directed by the Court of Appeals to consider.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS AND NO HOLDING AT VARIANCE WITH ANY DECISION OF THIS COURT.

Petitioner reads the decision of the Court of Appeals too broadly. The court did not hold that it would never recognize an antitrust claim based upon fraudulent enforcement of trademarks, but only that such claim could not be sustained under the facts of this case. The authorities cited by petitioner are not in conflict with the decision of the Seventh Circuit, but only stand for the proposition that claims based upon fraudulent patent procurement or bad-faith trademark enforcement *may* constitute legal claims in particular circumstances.

Both cases relied upon by petitioner, *Walker Process Equipment* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965) and *Kellogg Co.* v. *National Biscuit Co.*, 71 F. 2d 662 (2d Cir. 1934), were decided on the pleadings and merely reinstated complaints against fraudulent acts. Both cases recognized the possibility of antitrust claims, but only if certain facts could be proven. Here, we have a full trial record, and petitioner has fallen far short of proving any facts in support of its disconnected antitrust claims. The opinion of the Seventh Circuit is therefore entirely correct and amply supported by the record.

This Court in *Walker Process* merely held that the fraudulent procurement of a patent may be utilized as a part of a monopolization scheme. That decision relied

heavily upon *Precision Instrument Manufacturing Co.* v. *Automotive Maintenance Machinery Co.*, 324 U.S. 806, 816 (1945), where this Court emphasized that a patent is an express exception to the general rule against monopolies. Necessarily, fraudulent procurement of a patent and its misuse may have a bearing on a monopolization claim. This Court stressed in *Walker Process* that all other elements necessary to establish monopolization also must be proven. A trademark is not an express exception to the rule prohibiting monopolies. Nothing in the *Kellogg* case is in any way inconsistent with the *Walker* rationale or the decision of the Seventh Circuit here.

The questions posed by petitioner are hypothetical only. Unlike *Walker* and *Kellogg*, the Seventh Circuit had a full record here upon which to base its holding. This Court should not disturb that holding.

Conclusion

Respondent respectfully prays that the cross petition for writ of certiorari be denied.

Respectfully submitted,

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June 19, 1970